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## CITATIONS





319-701—68

# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 11

IGOR A. IVANOV, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 197

JOHN WILLIAM BUTENKO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (A. 17–43) is reported at 384 F. 2d 554.

### JURISDICTION AND QUESTIONS PRESENTED

The judgment of the court of appeals was entered on October 6, 1967 (A. 44). By orders of October 25, November 3, and November 14, 1697, Mr. Justice Brennan extended the time for filing the petitions for

certiorari herein until December 5, 1967, and the petitions were filed on that date. On January 23, 1968, a motion to amend the petitions for certiorari was filed. Certiorari was granted on June 17, 1968, limited to the following questions:

> On the assumption that there was electronic surveillance of petitioner or a codefendant which violated the Fourth Amendment,
>
> (1) Should the records of such electronic surveillance be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioner, and if so to what extent?
>
> (2) If *in camera* inspection is to be authorized or ordered, by what standards (for example, relevance, and considerations of national security or injury to persons or reputations) should the trial judge determine whether the records are to be turned over to the defendants?
>
> (3) What standards are to be applied in determining whether petitioner has standing to object to the use against him of information obtained from such illegal surveillance? More specifically, if illegal surveillance took place at the premises of a particular defendant,
>
> (*a*) Does that defendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?
>
> (*b*) Does a codefendant have standing to object to the use against him of any or all information obtained from the illegal surveil-

lance, whether or not he was present on the premises or party to the overheard conversation?

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

After a jury trial in the District of New Jersey, petitioners were convicted of conspiring to transmit to the Soviet Union information relating to the national defense of the United States in violation of 18 U.S.C. 794 (a) and (c) (Count One), and of conspiring to violate 18 U.S.C. 951 by causing Butenko unlawfully to act as an agent of the Soviet Union without prior notification to the Secretary of State (Count Two). Butenko was also convicted of the substantive offense of unlawfully acting as an agent of the Soviet Union in violation of 18 U.S.C. 951 (Count Three). Butenko received concurrent sentences of 30 years, 10 years and 5 years' imprisonment on the three counts on which he was convicted, and Ivanov received concurrent sentences of 20 years' imprisonment on Count One and 5 years on Count Two. The court of appeals affirmed the conviction of Butenko on all counts, affirmed Ivanov's conviction on Count One, but set aside his conviction on Count Two.[1]

[1] The court of appeals held that the government had failed to prove that Ivanov knew that Butenko had not registered with the Secretary of State and, therefore, reversed the conviction on Count Two. The government is not seeking review of that decision.

ARGUMENT

Conversations of each of the petitioners in these cases were overheard by the use of electronic surveillance equipment.[2] We submit, however, that an *in camera* examination of the records of the overheard conversations would establish to the satisfaction of the trial judge that the surveillance could not possibly have furnished leads to any evidence used against petitioners. Accordingly, for the reasons elaborated in our brief in *Alderman* v. *United States,* No. 133, October Term, 1967,[3] we believe immediate disclosure to petitioners inappropriate and suggest that the causes be remanded to the district court for an *in camera* inspection of the materials, which the government undertakes to submit for that purpose.

There is no occasion to repeat what we said in our *Alderman* brief in answer to the Court's particularized inquiries. Those responses are fully applicable here. We turn, instead, to the special considerations which argue uniquely against automatic disclosure in circumstances like those presented in these cases.

1. Proper consideration of the question must begin with the historical fact that, at least since 1940, electronic surveillance, involving the overhearing of tele-

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[2] In some of the instances the installation had been specifically approved by the then Attorney General. In others the equipment was installed under a broader grant of authority to the F.B.I., in effect at that time, which did not require specific authorization. As noted below, present Department of Justice policy would call for specific authorization from the Attorney General for any use of electronic equipment in such cases.

[3] Copies of that brief have been served on counsel for petitioners in these cases.

phone calls and other conversations, has been consistently employed by the government of the United States to obtain foreign intelligence information and to protect national defense material and information from espionage and sabotage. As an express Executive policy, this practice dates from a confidential directive from President Roosevelt to Attorney General Jackson on May 21, 1940. President Truman reaffirmed the policy in 1946 and all succeeding Attorneys General have followed it. See generally, Rogers, *The Case for Wire Tapping,* 63 Yale L.J. 792 (1954). In 1965, acting on directions from President Johnson,[4] Attorney General Katzenbach expressly limited the use of electronic surveillance to investigations involving the national security. Similarly, the present Attorney General, although prohibiting other wiretapping and eavesdropping by the Executive Branch, has recognized an exception for national security investigations:

> Special problems arising with respect to the use of devices of the type referred to herein in national security investigations shall continue to be taken up directly with the Attorney General in the light of existing stringent restrictions.[5]

The practical necessity for this Executive policy is not open to serious question. Surely, in today's world, no one doubts that it is vital to the survival

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[4] Memorandum of June 30, 1965; N.Y. Times, July 16, 1965, p. 6.

[5] Memorandum of Attorney General Clark of June 16, 1967.

of the nation for the government to maintain an effective system for gathering intelligence information relating to foreign affairs. Equally obvious is the real danger presented by efforts of foreign powers to learn our vital defense secrets. In light of these realities, it is hard to conclude that surveillance activities of the kind involved here are barred by the Fourth Amendment. That Amendment forbids only "unreasonable searches and seizures." Both on historical and practical grounds it is not inappropriate to conclude that the sort of surveillance involved here is reasonable. For, as this Court has said, "while the Constitution protects against invasions of individual rights, it is not a suicide pact," *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 160; *Aptheker* v. *Secretary of State,* 378 U.S. 500, 509; it "does not withdraw from the Government the power to safeguard its vital interests," *United States* v. *Robel,* 389 U.S. 258, 267.

It is at least arguable that, within this narrow area, the Executive has independent constitutional authority. The Court has recognized that the "President * * * possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U.S. 103, 109. See, also, *United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304, 314. And, when exercising those powers, the Executive's action normally is beyond judicial review:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs,

> has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of an Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. * * * [*Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp., supra,* at 111]

Thus, a good case can be made for the proposition that the Executive is empowered to determine for itself when it is "reasonable" to utilize electronic surveillance in intelligence gathering and counterespionage operations. See Mr. Justice White, concurring, in *Katz* v. *United States,* 389 U.S. 347, 363–364. Cf. *Abel* v. *United States,* 362 U.S. 217 (involving the question of administrative arrest); *Ex Parte Quirin,* 317 U.S. 1; Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View,* 44 Minn. L. Rev. 891, 919–920 (1960); Westin, *Privacy and Freedom* 391 (1967). Indeed, the Congress has apparently concluded that the President does possess such power, for the recent legislation governing the interception of wire and oral communications (Omnibus Crime Control and Safe Streets Act of 1968, Section 2511(3), 82 Stat. 213) expressly provides:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect

> the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. * * *

2. In suggesting the constitutional propriety of electronic surveillance to safeguard the national security, we do not tender that question for decision here. To be sure, it could be argued that the exclusionary rule of *Mapp* v. *Ohio,* 367 U.S. 643, can have no application to *legally* obtained evidence, since its sole function is to assure compliance with the Fourth Amendment. Yet, there may be independent considerations of due process which argue for excluding evidence obtained by undisclosed means, among them the inability of the defendant to traverse effectively the government's allegation that the underlying surveillance was undertaken for national security reasons. Moreover, the special constitutional prerogatives of the Executive may be more attenuated when he invokes the judicial process. Just as the Legislative Branch enjoys greater latitude when it imposes internal discipline (*e.g., McGrain* v. *Daugherty,* 273 U.S. 135) than when it resorts to the courts (*e.g., Deutch* v. *United States,* 367 U.S. 456), so the broad powers of the President with respect to intelligence and counterespionage operations may not fully carry-over when judicial proceedings are instituted against an individual.

At all events, the government has not claimed that evidence obtained by electronic eavesdropping in the

course of a national security investigation is admissible in a criminal trial. And we do not advance that argument here. On the contrary, we adhere to the submission already made in these cases, that the records of the overheard conversations ought to be turned over to the trial judge for a determination whether anything in them was arguably useful to the prosecution. Yet, it is relevant that the surveillance was presumptively legitimate, undertaken for national security purposes.

As we have already noted, the very nature of the operations involved in this area often makes it impossible for the government to disclose its activities publicly—even to the extent necessary to establish that they were constitutionally proper—without seriously compromising the national security. And, of course, the Executive is privileged to refuse disclosure in these circumstances. *Totten* v. *United States,* 92 U.S. 105; *United States* v. *Reynolds,* 345 U.S. 1. See, generally, Zagel, *The State Secrets Privilege,* 50 Minn. L. Rev. 875 (1966). That leaves only a hard choice between jeopardizing internal security or risking foreign embarrassment, on the one hand, and letting a serious criminal go free, on the other. See, *e.g., United States* v. *Andolschek,* 142 F. 2d 503 (C.A. 2). At the least, we submit the government should not be put to that election in those situations where the district judge can easily determine from an examination of the records of the overheard conversation that they supplied no leads to any of the evidence used against the defendants.

## CONCLUSION

The judgment of the court of appeals should be vacated and the cases remanded to the district court with the following instructions:

As to each defendant—

1. The government shall deliver to the trial judge, for his *in camera* inspection, all records resulting from electronic surveillance of conversations to which the defendant was a party or which occurred on premises in which he then had a protectable interest;

2. If the trial judge concludes from an examination of the materials submitted that nothing overheard was arguably relevant to the prosecution of the defendant, he shall decline production and shall order the records sealed and preserved for appellate review;

3. If the trial judge is unable to determine with certainty that the overheard conversations were unrelated to the prosecution of the defendant, he shall order the government either to make disclosure to the defendant or to dismiss the prosecution against him.

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SEPTEMBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968